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No. 694.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

C. O. MASON, INC., *et al.*

BRIEF FOR C. O. MASON, INC. IN OPPOSITION.

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Opinions Below.

The opinion of the Court of Customs and Patent Appeals is reported at C. A. D. 844 and has been reprinted by petitioner in its Appendix. The opinion of the Customs Court is reported at 49 Cust. Ct. 89 and is reprinted herein as an Appendix.

Jurisdiction.

Petitioner seeks to invoke jurisdiction under 28 U. S. C. §1256.

Statement of the Case.

The United States has petitioned for a writ of certiorari to review a decision adverse to it below by the United States Court of Customs and Patent Appeals, which

in turn affirmed a decision adverse to the United States by the United States Customs Court, Third Division.

This action was brought to recover duties on imported coffee unconstitutionally assessed against respondent C. O. Mason, Inc. and liquidated by the Collector of Customs at the Port of San Juan, Puerto Rico. The rates were fixed by the Secretary of Agriculture and Commerce of Puerto Rico pursuant to Act No. 95 of the Legislature of Puerto Rico (13 L. P. R. A., Sec. 2201, Supp.), which Act was declared unconstitutional by the Customs Court in *Pan American Standard Brands, Inc., et al.* v. *United States,* 43 Cust. Ct. 122, C. D. 2115. In *Pan American,* the court held that the delegation of authority from the Legislature of Puerto Rico to the Secretary of Agriculture and Commerce to increase or decrease the duty on coffee imported into Puerto Rico was without proper safeguards and, therefore, an illegal delegation of legislative power. The court further held that the resolution of the Secretary of Agriculture and Commerce pursuant to said statute, increasing the duty on imported coffee, was invalid. The government took no appeal from that decision which became final on February 19, 1960.

The entries involved in this case were liquidated between June 10, 1957 and September 11, 1959. Respondent filed a protest on July 21, 1960 against the Collector for his refusal to liquidate these entries in accordance with the rates prevailing prior to the illegal order of the Secretary of Agriculture and Commerce. The Collector denied the protest on the ground that respondent had not filed its protest within 60 days of liquidation pursuant to Section 514 of the Tariff Act of 1930.

Respondent had made 29 coffee entries involving a total duty assessment of $36,747 (Transcript of Record, p. 9).

The duty rates struck down in *Pan American* represented an increase of 100 per centum over the lawful rates existing prior to April 18, 1957, hence the refund of duties at issue here is one-half that amount, i.e. $18,373.50.

The Customs Court, in four cases raising identical issues, ruled that the assessment and liquidation of the duties were void, and dismissed the protests to the liquidations, not on the ground that they were filed too late, but on the basis that they were prematurely filed.

The government appealed that decision to the Court of Customs and Patent Appeals where it urged that the opinion of the Customs Court "failed to differentiate between cases involving (1) complete liquidations in which there has been compliance with all the procedural requirements of liquidation, and which must be challenged by timely protests; and (2) incomplete liquidations, which may be challenged on procedural grounds at any time prior to compliance with the necessary procedures." (Opinion below, petition, p. 5a). The government contended that where the Collector had not performed all the acts required of him in liquidating entries, there has actually been no final "legal liquidation" and, as a consequence, the protest should be properly dismissed as premature, the Collector directed to reliquidate so that the importer would have an opportunity to question its legality by timely protest. (Opinion below, petition, p. 5a). It claimed, however, that where the Collector had performed all of his required acts that the question of the constitutionality of the statute under which he operated could be raised only within 60 days. (Opinion below, petition, p. 5a). Respondent contended that a liquidation made on the sole authority of an unconstitutional statute was not a legal liquidation effective to support a protest or commence the running of the Statute of Limitations provision of Section 514 of the Tariff Act.

The Court of Customs and Patent Appeals stated the issue before it as follows: Whether protests against the Collector's liquidations of duties between June 1957 and December 1959 under a provision of a statutory enactment subsequently ruled unconstitutional by the Customs Court in a decision which became final on February 19, 1960, will lie when the protests were filed more than 60 days after the date the liquidations were made.

The opinion of the Court of Customs and Patent Appeals affirming the decisions and judgments of the Customs Court was unanimous.

Argument.

This case involves a narrow question of customs law. The government would now urge that it presents consequences ranging far beyond the imagination of the two courts which have decided adversely to it below. The decision below evidences none of the imaginary horribles set forth in the petition as grounds for granting certiorari. It simply interprets two related provisions [Sections 505 and 514] of the Tariff Act of 1930 under existing customs decisions.

1. The government informs this Court that Section 514 of the Tariff Act of 1930—and its policies of repose—are defeated by the decision below since under that statute "No plainer language could be employed to indicate that *all* determinations of the Collector, regardless of their basis, are to be final and conclusive unless challenged within sixty days" (Petition, p. 10).

Yet it was the government itself which urged upon the Court of Customs and Patent Appeals the argument that certain categories of liquidations, which it termed "incom-

plete'' and which raised ''procedural questions,'' might be challenged *at any time* irrespective of the expiration of the 60 day limitations period of Section 514 while others were ''substantive'' and had to be raised in 60 days (Brief for the United States, Court of Customs and Patent Appeals, p. 21). The Court below noted that ''substantive-procedural'' contention as the government's principal argument (Opinion, reprinted in petitioner's Appendix, p. 5a) and rejected it:

> ''We are unable to find any reasonable basis for that distinction. As with a liquidation involving 'procedural questions,' we think that a liquidation based on an unconstitutional provision of a statute is not a final legal liquidation to start the running of the statute of limitations within the purview of section 514'' (Petitioner's Appendix, p. 9a).

It ill behooves the government to contend at this time that Section 514 cuts off all challenges to a Collector's liquidation when it offered a line of customs cases establishing the right to challenge such acts at any time subject only to the doctrine of laches. (Brief for the United States below, pp. 21-30).

The question before the court below turned on whether this case belonged in the existing line of customs decisions holding that certain acts of the Collector did not result in a ''final legal liquidation'' such as to commence the running of the 60 day statute.

In the customs field the doctrine of void liquidations existed for many years. *United States* v. *Passavant,* 169 U. S. 16. A variety of actions and failures to act on the part of customs officials have been held to void liquidations in such a manner that filing of both protests and appeals for reappraisement are not confined to the statutory period.

In *United States* v. *Passavant, supra,* this Court held that the valuation of an appraiser was not conclusive and binding upon all parties ". . . where the appraiser or collector has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute." (169 U. S. 21).

Subsequent decisions by the Court of Customs and Patent Appeals have applied this principle in situations where a limitations period has run. Action by customs officials proceeding on a wrong theory of law result in a void appraisement and consequently an equally void liquidation, permitting challenge to such action to be made by protest after the statutory period to appeal the appraisement. *James S. Kean* v. *United States,* 20 C. C. P. A. (Customs) 388, T. D. 46186 (1933). In *Stubbs* v. *United States,* 7 Ct. Cust. App. 399, T. D. 36967 (1917), the Court of Customs and Patent Appeals found neither the government nor the importer bound by the action of a collector who had acted on an assumption of certain authority which was wholly denied him under the applicable statute. The Court stated that the attempted liquidation in that case ". . . was not simply voidable but . . . was absolutely null and void. . . . The collector possessed no statutory power or authority at the time to make any liquidation" (*Id.,* 403). The overreaching by the collector in the *Stubbs* case having resulted in an absolutely null and void liquidation, it was held that said liquidation did not operate to commence the statute of limitations to run.

Similarly, as noted by the opinion below, in cases where the collector has failed to give notice of liquidation, or to post such notice in accordance with applicable regulations, liquidations have been considered void and ineffective to support a protest. *United States* v. *Astra Bentwood Furni-*

ture Co., 28 C. C. P. A. (Customs) 205, C. A. D. 147 (1940); *Standard Oil of La.* v. *United States*, 33 C. C. P. A. (Customs) 152, C. A. D. 329 (1946); *Lorraine Fibre Mills, Inc.* v. *United States*, 38 Cust. Ct. 94, C. D. 1848 (1957). In addition, failure to give notice of appraisement voids a liquidation based upon it despite expiration of the statutory appeal period. *United States* v. *James H. Rhodes & Company*, 40 C. C. P. A. (Customs) 1, C. A. D. 488 (1952).

Thus, it is well established in customs law that a liquidation judicially declared to be "void" is a mere nullity, and failure to protest it within sixty days cannot make it binding and conclusive upon either the importer or the United States.

The only new question below was whether a liquidation made on the sole authority of a statute subsequently ruled *unconstitutional* fitted within the existing doctrine of "void liquidations" so as to be legally ineffective to commence the running of the 60 day limitations period, not being a liquidation "as provided by law." Whatever the application of *Norton* v. *Shelby County*, 118 U. S. 425, 442, or the exceptions thereto, within the narrow ambit of customs law, the court below saw no reason to depart from its general rule.

The government itself conceded below the existence of cases where the Collector had overlooked an importer's successful appeal to the Customs Court, had liquidated the entries at the higher value determined by the government's appraiser, and was unable to prevent challenge by protest filed after the 60 day period. *Nozaki Bros., Inc. and Frank Dow, Inc.* v. *United States*, 41 Cust. Ct. 245, C. D. 2048 (Brief of United States, below p. 28). Significantly, the court in the *Nozaki* case stated (p. 251):

> "When we say that the liquidations herein are void we use the term in its literal and absolute sense,

> meaning that an act so characterized is an absolute nullity wholly lacking in legal efficacy, unable in law to support the purpose intended, incapable of ratification, confirmation or enforcement in any manner or to any degree. . . . The term 'void' as we here apply it to those liquidations connotes utter negativeness which is the equivalent of nonexistence. Void things are in legal effect no things.
>
> "It seems to be the position of counsel for the defendant that even if these liquidations are void, plaintiffs' remedy would be timely protest and in the absence of such protest his liquidations become final and binding.
>
> "The fallaciousness of this argument is readily apparent. If these liquidations are void in the sense that a void act is no act, there are clearly no liquidations against which protest could be filed. Under the express terms of §1514, *supra*, protests may not be filed before liquidation. Therefore, the protests herein are premature."

The government termed the *Nozaki* case wrongly decided (Brief below, p. 28). It now ignores the existence of such cases (petition, p. 9), citing examples of how erroneous or whimsical liquidations of a Collector could be fitted within the decision of the court below. The point is that many acts of the Collector of Customs have already been held so void as not to commence the running of the 60 day limitations period. The decision below is a narrow one fitting this case into that line of cases. The government is well aware of the cases for it asserted its own "substantive-procedural" dichotomy below and attempted to distinguish those precedents which it thought unhelpful. It cannot now claim that *all* determinations of the Collector are final and conclusive unless challenged within 60 days in order to convey an impression that the decision below emasculated

a limitations period. The Court of Customs and Patent Appeals was simply unpersuaded that the line of customs authority advanced by the government was applicable. It left intact all of previously existing customs law interpreting the 60-day limitations statute.

2. The petition asserts that the decision below is inconsistent with principles of limitations statutes. Suffice to state that we are not here concerned with anything other than the very unusual procedure established by Congress in Sections 505 and 514 of the Tariff Act for the filing of timely protests of liquidations. Section 514 is a uniquely short limitations provision, rather more similar to a court rule for timely filing of an appeal than to the common 2-6 year periods found in most statutes of limitation. It is peculiar to the customs area. It should not be unthinkingly analogized to other types of limitations statutes and, in our view, could not be.

Section 514 provides that protests be filed "within sixty days after, but *not before* such liquidation". (Emphasis added.) For many years under customs law the legal question has been whether a legal liquidation has taken place since a protest cannot be filed *before* a "liquidation" has taken place as well as 60 days *after* that operative legal act. Where the courts have felt that a proper "liquidation" has not taken place, they have reasoned that the protests must be dismissed as *prematurely* filed, in order that the collector may liquidate in the manner provided by law. The claimant can then file another "mature" protest if he is so inclined after the collector has re-liquidated so as to cure the defect in his first action. This statute and its progeny of case law are peculiar to the customs field.

3. The Court below considered the intention of Congress in putting an end to matters in controversy. It found that the language of the statute itself did not evidence an intention that the 60-day requirement of Section 514 be applicable in every case. (See opinion below, petition, p. 9a). The decision no more defeats the policies of repose embodied in Section 514 than do all of the existing cases establishing the doctrine of void liquidations, which has been accepted in the customs field since 1898.

Kavanagh v. *Noble*, 332 U. S. 535, relied on by petitioner, involved an entirely different statute. Further, the question there was which of either a four year or a two year limitation statute applied in the context of a limitations policy entirely distinct from that in the customs area. In *Kavanagh* a Treasury regulation was "set aside" by later court decision. Also, the statute there ran from the time of the taxpayer's overpayment, not from any act of the administrator based on the regulation. The present case concerns the situation of a statute declared unconstitutional where the administrator acted solely on the basis of that statute and only his "legal" action would have commenced the running of the short limitations period.

4. The petition recites a parade of horribles. It would appear appropriate to await some evidence of the "threat" this decision poses to other federal statutes by other courts. The Solicitor General is well qualified to protect the interests of the government as they actually arise without undertaking the additional burden of speculating on evils which may arise from citation of the decision below by others in non-customs cases.

The government takes the strange position of stating that the decision is obviously wrong (petition, p. 7), but that other federal courts are going to go out of their way

to follow such a glaringly wrong decision in other areas (petition, p. 12).

It is customary to await the occasion of a conflict between decisions of federal courts prior to the exercising of this Court's discretionary review power (Rule 19, 1.(b) and 2., Rev. Rules of the Supreme Court of the United States). This Court does not sit to review every alleged error made below, particularly in technical areas where Congress has created a court designed to possess technical expertise.

5. This case was argued in a narrow compass (see Statement of the Case, *supra*), decided in a narrow compass (see opinion below) by a court established for that very purpose. It is difficult to visualize how it could now be cited outside this area. The government does not claim that this particular application of Section 514 has any great practical significance in the customs area, since it admits that tariff statutes are rarely declared unconstitutional (petition, p. 12). It professes concern, however, over the dissimilar situation where other actions are later set aside. The point is that this decision is clearly limited to the tariff statute which is declared unconstitutional and stands only for that. We submit that certiorari is not granted on the basis of speculation or surmise in order to head off problems which may or may not arise. The government has ample opportunity to protect its legal position in later cases should they arise.

6. The petition states the decision "opens the door to constitutional attacks upon countless tariff provisions" (petition, p. 13). We fail to see in what manner constitutional attacks, which are lacking in merit, are encouraged by the decision. We would assume that those attacks which are well taken would stand or fall on their own merit.

7. We are told that the decision is so obviously wrong that it warrants review and yet the only case which the government relies on heavily (*Kavanagh* v. *Noble, supra*) has nothing to do with the area of customs law, and is completely distinguishable from the instant case as demonstrated above. Assuming *arguendo* for the moment that this Court would grant certiorari, it is relevant to ask what the posture of the case would then be. Simply stated, the Court would then be asked to either adopt the principle urged by the government in its petition which would require reversal not only of this case, but of all the customs cases cited above, thus upsetting many years of decided customs cases, or it would be asked to adopt the government's original "substantive-procedural" dichotomy, which has thus far been rejected by every court to which it has been offered.

8. It is respectfully submitted that the principle announced by the Court below cannot realistically be said to transcend customs litigation. The decision is peculiarly based upon an interpretation of Section 514. The government says similar reasoning could be employed to challenge the limitations periods under the Tucker Act or the Suits in Admiralty Act. The latter provision (46 U. S. C. §745) is entirely dissimilar to Section 514, providing for a 2-year period *after a cause of action arises,* thus clearly geared to an entirely different body of established case law. As to the Tucker Act, an elaborate body of case law already exists in the Court of Claims under its limitation provision (28 U. S. C. §2501) part of which is geared to "accrual of a claim", part to "termination" of river and harbor improvements, part to "cessation" of a disability. No logical reason appears why a customs decision should be employed to subvert years of decided Court of Claims cases

interpreting a different act. The petition asserts (p. 13) that the only requirement to create such a threatening situation would be "a contention" that an administrator had acted on the basis of an unconstitutional statute. We respectfully note that here involved was not a "contention" but a judicially declared status of unconstitutionality.

9. The government notes (petition, p. 8) that the principles here involved are identical to those decisions of this Court holding litigants to the particular procedures established for challenging actions of government officials. We accept that principle and respondents have followed it throughout by rigorously complying with the procedure set out by the Tariff Act of 1930, and the decisions interpreting Section 514. The cases cited by the government, however, concern the failure of a litigant to exhaust administrative remedies. That is not the situation here involved.

10. The government has adverted to the effect of the decision to open stale litigation. The government itself urged below that challenges to "procedurally incomplete liquidations" might be raised at any time, *subject to the claim of laches.* (Brief of United States below, p. 21) Should the government realistically be concerned over the prospect of such stale claims, it cannot be questioned that the doctrine of laches is available to it. The government suggested below that the protests here were barred by laches. The Court of Customs and Patent Appeals noted that this defense was not raised at the trials below and where it is not so raised it is not available on appeal. (Opinion, p. 11a) It would, however, always be available to the government when properly raised.

Conclusion.

The decision below has importance to the individual litigants, possibly to some persons concerned with customs matters, but clearly to no others. It involves a rather narrow question in the technical customs area. It was correctly decided below by two courts and does not raise any special or important question warranting the time or the concern of this Court. It is respectfully submitted that the petition should be denied.

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APPENDIX.

Decision of the Customs Court.

(C.D. 2364)

C. O. MASON, INC.

v.

UNITED STATES

Coffee—Administration

• • • •

United States Customs Court, Third Division
Protest 60/19760-684 against the decision of the collector of customs at the port of San Juan

• • • •

(Decided October 8, 1962)

• • • •

RICHARDSON, Judge: The merchandise that is the subject of the instant protest consists of coffee which was imported at San Juan, P. R. The importations are covered by some 29 separate entries. The protest is before this court on a motion made by defendant's counsel at the trial attacking the protest and seeking its dismissal under 19 U. S. C. A., section 1514 (§514, Tariff Act of 1930), on the ground of untimeliness.

Section 1514, *supra*, reads:

> Except as provided in subdivision (b) of section 1516 of this title (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs

> laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector settting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation. (June 17, 1930, ch. 497, title IV, §514, 46 Stat. 734.)

There appears to be no dispute concerning the essential facts which prompted the Government's attorney to make the motion to dismiss. It appears that the involved entries were liquidated at various times between June 1957 and September 1959. The instant protest, which is addressed to these liquidations, was filed with the collector on July 21, 1960. It reads in part:

> Protest is hereby made against your liquidation assessing duty on entries listed below, subject of this

communication. The reaons for the objection under Section 514 of the Tariff Act of 1930, as amended, are as follows:

> The imported merchandise covered by the below-listed entries was improperly classified by you, in our opinion, as follows under regulations existent at that time.
>
> 1. Namely this covers ground coffee and instant coffee received from the Maxwell House and Sanka Divisions of the General Foods Corporation, on which duty was paid in the amount of 36 cents per pound on the regular ground coffee, and 30 cents per pound on the raw coffee used in preparation of the instant coffee.
>
> 2. Whereas, it is our belief that coffee during the covering period should have been charged duty in the amount of 18 cents per pound on the ground coffee, and 15 cents per pound on the raw coffee used in the preparation of the instant coffee.
>
> This protest is based on Custom Court Ruling basically made under date of 15 September 1959, which protest was made final after a re-hearing under date of 19 February 1960.
>
> On the basis of the above, request is hereby respectfully made for a reliquidation of the enclosed series of entries.

Concerning the merits of the controversy, the Government's attorney made the following statement (R. 2-3):

> Mr. Sklaroff: We can concede on the merits plaintiff has a case, in that the merchandise in issue is the same in all material respects to C.D. 2115. and if he gets over the hurdle of timeliness, we concede.

Decision of the Customs Court.

Judge Lawrence: That in the opinion of the attorney for the defendant, the plaintiff is entitled to judgment provided the protest is timely?

Mr. Sklaroff: I have been so informed by the Chief Liquidator here, and the Customs officials here, with respect to all the other cases.

Admittedly, the instant protest was filed well after the expiration of 60 days subsequent to the liquidations here involved. The defendant contends that, by reason thereof, this court lacks jurisdiction over the protest. On the other hand, the plaintiff maintains that the liquidations of the involved entries were void and, as such, are not binding and conclusive. The question which remains for determination is whether the untimely filing of the protest is fatal to plaintiff's right to relief. In this connection, we deem it pertinent to refer to our decision in *Pan American Standard Brands, Inc., et al.* v. *United States,* 43 Cust. Ct. 122, C.D. 2115, which is cited in the briefs of counsel and which was also alluded to in the protest and mentioned on the oral argument of the motion.

In *Pan American Standard Brands, Inc., et al.* v. *United States, supra,* the plaintiffs entered importations of roasted coffee at the port of San Juan, P.R., on April 22, 1957, and May 1, 1957. By an act of Congress (19 U.S.C.A., § 1319) the Legislature of Puerto Rico was authorized to levy customs duties on coffee imported into Puerto Rico. And, by virtue of this authority, the Legislature of Puerto Rico enacted a statute (Act No. 77 of 1931) which, as amended in 1934 and 1935, resulted in a duty levy of 15 cents a pound and 18 cents a pound, respectively, on imports of raw coffee and roasted or ground coffee. Then, on June 21, 1955, Act No. 77 was again amended by the Legislature of Puerto Rico by Act No. 95 (13 L.P.R.A., § 2201, supp.), which reads in part as follows:

§ 2201. Amount of duty; definition

As soon as this Act takes effect all coffee introduced into Puerto Rico shall pay a duty of fifteen (15) cents a pound for raw coffee and eighteen (18) cents a pound if roasted or ground coffee, said duty to be collected by the Federal Customhouse Service established in Puerto Rico, under such regulations as it may promulgate therefor; *Provided, That when market conditions may warrant it and for the purpose of protecting the consumer or the coffee industry, the Secretary of Agriculture and Commerce is hereby authorized, until June 30, 1958, to increase or reduce the duty levied by sections 2201-2205 of this title, after a public hearing to that effect. The reduction or increase determined by the Secretary of Agriculture and Commerce shall be subject to the approval of the Governor. Every resolution increasing or reducing the duty levied shall be accompanied by a statement concerning the consideration borne in mind for making the change;* * * *. (Italics supplied.)

Thereafter, and pursuant to this statute, the Puerto Rican Secretary of Agriculture and Commerce issued, and the Governor of Puerto Rico approved, a resolution, effective April 18, 1957, declaring an increase in the rates of duty on raw coffee and on roasted or ground coffee imported for use, consumption, and sale in Puerto Rico, from 15 cents a pound and 18 cents a pound, respectively, to 30 cents a pound and 36 cents a pound, respectively. Duties were assessed against plaintiffs' importations and the entries were liquidated by the collector pursuant to this resolution of the Puerto Rican Secretary of Agriculture and Commerce.

We sustained the plaintiffs' protests in *Pan American Standard Brands, Inc., et al.* v. *United States, supra,* and

held unconstitutional as an unlawful delegation of legislative power the provision of Act No. 95, *supra*, which empowered the Secretary of Agriculture and Commerce of Puerto Rico to modify, without any guidelines or standards, the rates of duty levied by that statute. We also held invalid the aforesaid resolution of the Puerto Rican Secretary of Agriculture and Commerce, issued under said statutory provision, and the duty assessments made pursuant to said resolution. No appeal was taken by the Government in the case, in consequence of which, our decision became the law of the case.

In the *Pan American Standard Brands, Inc., et al.*, case, the question at issue here, the timeliness of the protest, was not before us. However, the effect of our decision was to declare the duty assessments and liquidations under the entries covered by the protests there involved, void *ab initio*. A decision against the constitutionality of a statute makes the statute entirely null and inoperative, and the invalidity dates from the time of enactment. *Norten* v. *Shelby County*, 118 U. S. 425, 30 L. Ed. 178. In some situations, where a statute is declared to be unconstitutional, there may be questions of vested rights and of public policy which cannot be erased by the new judicial determination, but no such factors have been presented in this case and the plaintiff should be granted relief. Counsel for the defendant concedes that, on the merits, the plaintiff's protest brings it within the ruling in C.D. 2115, and we are of the opinion that the same conclusion should be reached on the plaintiff's claim.

For purposes of ascertaining the time within which a protest against a collector's liquidation must be filed pursuant to section 1514, *supra*, a distinction has to be drawn between a liquidation which is legal, although erroneous and voidable as such, and one which is illegal and absolutely void. See *Stubbs* v. *United States*, 7 Ct. Cust. Appls. 399, 403, T.D. 36967; *United States* v. *Astra Bentwood Furniture Co.*, 28 C.C.P.A. (Customs) 205 C.A.D. 147. A liqui-

dation of the first type is a valid liquidation and stands as such unless and until it is set aside in subsequent proceedings. A liquidation of the second variety is a nullity and cannot support subsequent proceedings based thereon. The language of the protest statute concerns itself with the first type of liquidation. It is addressed to a review of the merits of the collector's decision itself, rather than to the jurisdiction of the collector to render the particular decision. The jurisdictional question is a factor which characterizes the second type of liquidation. It is axiomatic that, unless and until the collector has satisfied all of the jurisdictional requisites attendant upon the liquidating process, there is no liquidation against which a protest under section 1514, *supra,* would lie. With respect to protests taken against such nonexistent liquidations, it must necessarily be concluded that the protests have been lodged before liquidation and are, as such, premature within the meaning of the statute.

In a number of protest cases, the courts have either expressly or impliedly acknowledged and applied this distinction between a voidable (legal) liquidation and a void (illegal) liquidation from the standpoint of the question of timeliness of the filing of the protest. *Olavarria & Co., Inc.* v. *United States,* 40 Cust. Ct. 377, C.D. 2008, affirmed 47 C.C.P.A. (Customs) 65, C.A.D. 729; *United States* v. *Judson Sheldon Division, National Carloading Corp.,* 42 C.C.P.A. (Customs) 202, C.A.D. 594, reversing 32 Cust. Ct. 68, C.D. 1581; *Joseph Ullmann Brokerage Corp.* v. *United States,* 29 Cust. Ct. 254, C. D. 1478, affirmed 42 C.C.P.A. (Customs) 6, C.A.D. 560; *Standard Oil Co. of Louisiana* v. *United States,* 33 C.C.P.A. (Customs) 152, C.A.D. 329, affirming on other grounds 14 Cust. Ct. 146, C.D. 926; *United States* v. *B. Holman, Inc.,* 29 C.C.P.A. (Customs) 3, C.A.D. 164, reversing 4 Cust. Ct. 466, Abstract 43635; *United States* v. *Astra Bentwood Furniture Co.,* 28 C.C.P.A. (Customs) 205, C.A.D. 147, reversing 4 Cust. Ct. 19, C.D. 273. In all of these cases,

the courts first ascertained under the evidence presented whether the liquidations against which the protests were filed were legal or whether such liquidations were illegal. In those cases where the courts concluded that the liquidations were legal, the protests were dismissed as being untimely (too late). With respect to those cases where the courts concluded that the liquidations were illegal, the protests were also dismissed as being untimely, but only because they were prematurely filed.

In our opinion, the same distinction as made in the cited cases between legal and illegal liquidations governs the disposition of the instant protest vis-a-vis *Pan American Standard Brands, Inc.* v. *United States, supra.*

It is true that the subject matter of the cited cases evolved around the propriety of the posting of liquidation notices, while the subject matter of the involved protest concerns itself with the invalidity of the statute and executive resolution supporting the collector's duty assessments on the involved entries. However, we recognize in this difference of fact patterns no distinction in principle. In either case, the involved facts constitute integral parts of the liquidating process. As was stated by the Court of Customs and Patent Appeals in *United States* v. *B. Holman, Inc., supra,* at page 14, "all decisions of the collector involved in the ascertaining and fixing of the rate and amount of duties chargeable against imported merchandise entered for consumption are merged in and become a part of a legal liquidation, and it is a legal liquidation only, so far as the issues here are concerned, against which a protest will lie."

The principle of law followed in the cited cases has not heretofore been and should not be limited in application to the posting of liquidation notice cases. In *Nozaki Bros., Inc.,* and *Frank P. Dow Co., Inc.* v. *United States,* 41 Cust. Ct. 245, C. D. 2048, as in the case at bar, the Government also sought to have the protest dismissed on the ground

that it was filed too late. The collector's liquidation in that case was held to be void, and the protest against such liquidation was dismissed as being premature where the liquidation was made in disregard of the mandate of the court. Apart from the question of timeliness in the filing of a protest against a collector's liquidation, our appellate court held, in *United States* v. *William Heyer*, 31 C. C. P. A. (Customs) 111, C. A. D. 259, that the collector's duty assessment was illegal and void where it was based upon an illegal and void appraisement. And the holding in *United States* v. *William Heyer, supra*, was followed by the Customs Court in *Bluefries New York, Inc.* v. *United States*, 40 Cust. Ct. 515, Abstract 61804, and *Bluefries New York, Inc.* v. *United States*, 39 Cust. Ct. 79, C. D. 1909, wherein protests against liquidations supported by such illegal and void appraisements were dismissed as being premature upon the authority of that case. Inasmuch as it has been held that liquidations based upon void appraisements are void and cannot support protests addressed to them, there appears to be no sound reason why liquidations based upon void statutes and executive resolutions, as in the instant case, should be regarded any differently. We have examined the authorities cited in the defendant's brief, and find nothing in them which suggests that such liquidations should be regarded as being anything but void and incapable of supporting the protests.

For the reasons which we have stated in our opinion in *Pan American Standard Brands, Inc.* v. *United States, supra*, we conclude that the collector's assessment of duties against and the liquidation of the entries covered by the protest at bar are illegal and void. Consequently, it is the collector's duty to assess duties against the involved entries and liquidate the same in the manner provided by law so as to give the plaintiff an opportunity to duly protest against such liquidations if it be so advised. Therefore,

for the reasons stated herein, the protest is dismissed by reason of it having been prematurely filed.

Judgment will be entered accordingly.

RICHARDSON,
J.

Concurring:

JOHNSON,
J.

Dissenting Opinion.

DONLON, Judge: I regret that I am constrained to dissent from the decision of my colleagues and the action that is taken in their judgment. In my view, such decision and judgment are inconsistent with the recent decision and judgment in *Pan American Standard Brands, Inc., et al.* v. *United States,* 43 Cust. Ct. 122, C. D. 2115.

That was our unanimous decision and judgment. We sustained protests seeking to recover duties that had been exacted on imported coffee at the port of San Juan, P. R. Our decision held that Act No. 95 of the Legislature of Puerto Rico (13 L. P. R. A., section 2201, supp.) was an unlawful delegation of legislative power. Finding that the protests had been timely filed, judgment was entered directing the collector to reliquidate the entries and make refund of duties that had been unlawfully exacted.

We did not hold that those protests were premature. In a situation on all fours as to legality of the liquidation, and differing only as to timeliness of protest, we did not hold, as the majority here holds, that the liquidation was void and no right of protest followed. Our decision was that the liquidation could be protested, and that it had been timely protested.

Dissenting Opinion.

The difference here is that plaintiff slept on his statutory right to protest.

Either we were wrong in the case of *Pan American Standard Brands, Inc., supra,* or the majority is wrong here. I joined in that decision and judgment, and I have not changed my opinion. I see no basis for a different decision and judgment here. Liquidations under identical circumstances are not both subject to protest and not subject to protest.

The right to protest an unlawful liquidation is governed by time limitations that are imposed by Congress. Those who seek to sue the United States must do so within the terms of whatever congressional permission is given them to do so. If plaintiff did not file a timely protest, as the statute requires, plaintiff has no right to come before us late demanding a reliquidation, and we should neither direct reliquidation nor entertain the notion that there is a time in the future for timely protest and refund.

Defendant correctly argues that this protest should be dismissed on the ground that it was filed too late. Such a decision is consistent with our decision in *Pan American Standard Brands, Inc., supra.*

DONLON,
J.